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In the Supreme Court of the United States

OCTOBER TERM, 1975

DONALD EUGENE HICKMAN and
THOMAS HENRY LANDERS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that a ton of marijuana, seized during a search to which they consented, should have been suppressed.

After a non-jury trial in the United States District Court for the Southern District of California, petitioners were convicted of possession of marijuana with intent to distribute it (21 U.S.C. 841(a)(1)),

willful importation of marijuana (21 U.S.C. 952, 960), and conspiracy to commit those offenses (21 U.S.C. 846, 963). Each was sentenced to a total of 10 years' imprisonment, followed by a special parole term of 20 years.[1]

Petitioners' trial was conducted pursuant to a stipulation of facts, based largely upon the evidence adduced at a prior hearing on petitioners' unsuccessful motion to suppress approximately 1,965 pounds of marijuana seized by United States Customs authorities from a boat registered to petitioner Hickman. The evidence at the suppression hearing showed that on May 12, 1973, Customs Agent Robert Davis received a tip from a confidential informant that a 24-foot white "Fiberform" power cruiser had entered Mission Bay in San Diego, California, at approximately 11:00 p.m. the previous night "under curious circumstances" (Tr. 5). The informant reported that the license number of the vessel was CF9802FB (Tr. 34) and that it carried two occupants, one of whom he identified as petitioner Landers (Tr. 37).

An inquiry at the California Department of Motor Vehicles revealed that the license number had been issued to a boat owned by petitioner Hickman, a resident of Modesto, California (Tr. 5-6). Agent Davis thereafter learned from the Customs Service computer that Hickman had been suspected of criminal involvement in a prior pill smuggling scheme (Tr. 7). In addition, Davis was informed by Modesto police that both Hickman and Landers were currently under investigation for alleged narcotics trafficking (Tr. 10-11). Further investigation established that Landers possessed a boat trailer with license number JM6300 (Tr. 8) and that he owned a 24-foot white "Fiberform" power cruiser, identical to Hickman's boat, with license number CF9803FB (Tr. 12). The boats' sequential license numbers indicated that they had been purchased at about the same time.

[1] The district court imposed consecutive five-year sentences on the possession and importation counts and five-year terms on each of the conspiracy counts, with the conspiracy terms to run concurrently with those given on the substantive counts.

Approximately two weeks later, on May 26, 1973, Customs agents spotted petitioner Landers' empty boat trailer being pulled by a Chevrolet "carryall" in the vicinity of the Dana boat ramp at Mission Bay (Tr. 15). The trailer was subsequently unhooked and left near the ramp (Tr. 17-18). As Customs agents maintained surveillance of the trailer (Tr. 18), Agent Davis followed the Chevrolet, which was being driven by petitioner Hickman's wife, to the Islandia Hotel (Tr. 15-16). Davis then proceeded to a pier adjacent to the hotel where he found a 24-foot white "Fiberform" cruiser, license number CF9802FB, moored in boat slip D-9 (Tr. 17). After ascertaining that the slip had been rented by petitioner Landers, Davis and Customs Agent George Gore watched the boat throughout the night.

At about 10:00 a.m. on the next morning, Davis learned from the agents watching the Dana ramp

that a 24-foot white "Fiberform" power cruiser, having the same license number (CF9802FB) as the boat that he and Gore then had under surveillance in slip D-9, was maneuvering toward the ramp from Mission Bay and that the Landers trailer had been positioned to pull the approaching boat from the water (Tr. 19-23). Pursuant to instructions radioed by Agent Davis from his position at slip D-9, Customs agents Clyde Burnett and Fred Matteson stopped the pickup truck hauling the boat and trailer as the rig attempted to leave the Dana ramp area (Tr. 126). In response to questioning from Matteson and Burnett, the occupants of the truck, which included petitioners Hickman and Landers, reported that they had just returned from a fishing trip near the Coronado Islands in Mexican waters and that the boat and trailer belonged to petitioner Hickman (Tr. 133-134). Agent Matteson requested petitioner Hickman's permission to search the boat and Hickman agreed (Tr. 138-139).

Agents Matteson and Burnett boarded the vessel (the "load boat") at approximately 10:30 a.m.; Agent Davis and Gore arrived at the scene from slip D-9 a few minutes later. After a brief conversation with petitioners, Davis joined Matteson and Burnett on board the load boat (Tr. 26-27). Gore stayed at the Dana ramp site for only a few minutes (Tr. 82, 92, 101), and then returned to the marina to search the identical boat (the "decoy boat") still moored in slip D-9 (Tr. 82-83).

Upon his return to the Dana ramp at around noon, Gore boarded the load boat where agents Matteson, Burnett, and Davis were continuing their search. Based upon his observation of the interior design of the supposedly identical decoy boat at slip D-9 and a prior study of "Fiberform" sales brochures, Gore concluded that the deck of the load boat had been altered (Tr. 83-84). A closer inspection of the deck area, prompted by Gore's observations, disclosed a compartment beneath the deck that contained a large quantity of marijuana. Petitioners were immediately arrested (Tr. 85-87).

Arguing that Agent Gore lacked probable cause to search the decoy boat at slip D-9, petitioners contend that the marijuana subsequently located aboard the load boat at the Dana ramp with the aid of Agent Gore's interior design comparisons was tainted under the principles of *Wong Sun* v. *United States*, 371 U.S. 471. The court of appeals' finding that the agents had probable cause for the search, however, is correct, and does not merit further review.[2]

At the time that Agent Gore was dispatched from the Dana ramp to the decoy boat, the agents had probable cause to believe that that boat was involved in an illicit smuggling operation and that it contained

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[2] The opinion of the count of appeals does not explicitly address the issue of petitioners' standing to complain of the search of the decoy boat. In his separate concurring and dissenting opinion, Judge Zirpoli concluded that only petitioner Landers, as the registered owner of the decoy boat, had such standing (Pet. App. 10, n. 3).

evidence pertinent to the investigation of that scheme. As the court of appeals concluded, the agents' determination of probable cause was based on (Pet. App. 6):

> (1) the discovery that the appellants were involved with two identical boats with the same, supposedly unique registration number; (2) the tip from an assertedly reliable informer that the boat with appellants aboard had earlier arrived in Mission Bay under suspicious circumstances, corroborated by the registration number on the arriving boat and identification of the appellants by motor vehicle and hotel registration data; and (3) appellants' unusual activities in an area noted for a high number of smuggling violations.

In addition, the agents had received information from both the Customs Service databanks and Modesto police authorities linking petitioners with previous drug smuggling activities, petitioners stated that they had just returned from Mexican waters without making a customs declaration, and petitioner Hickman had told the agents that he owned the boat trailer although its license showed ownership in someone else (Pet. App. 8). The cumulative impact of these factors provided the agents with probable cause to infer the existence of a smuggling scheme involving the two boats, and to search the decoy boat

before it could be moved. *Chambers* v. *Maroney*, 399 U.S. 42.[3]

Indeed, even assuming that the search of the decoy boat violated petitioners' Fourth Amendment rights, that illegality did not taint the evidence seized from the load boat. The agents had reasonably focused their suspicion on the load boat (which petitioners were attempting to remove from the Mission Bay area) as the vessel containing contraband, and a search of unlimited scope authorized by the consent of the registered owner was in progress on the load boat *before* the search of the decoy boat was undertaken. Thus, the investigative effort that ultimately yielded the marijuana was lawfully underway before the alleged illegality occurred. See *United States* v. *Willis*, 473 F. 2d 450 (C.A. 6); *United States* v. *Brandon*, 467 F. 2d 1008 (C.A. 9).

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[3] Judge Zirpoli, dissenting on this point, contended that, while the agents may have had probable cause to believe that the two boats were involved in a smuggling scheme when they initially stopped the load boat at the Dana ramp, "the events that followed the stop really operated to vitiate any probable cause that the agents may have had at the outset simply because they were unable, after an hour of searching the load boat, to find anything" (Pet. App. 12). He concluded that the futile search refuted the agents' suspicions and that Agent Gore therefore lacked probable cause to search the decoy boat. This argument erroneously assumes that Agent Gore was sent to search the decoy boat only after a lengthy and fruitless search of the load boat. The record establishes, however, that Gore arrived at the Dana ramp only minutes after Agents Burnett and Matteson had boarded the load boat and that he left the scene to search the decoy boat two or three minutes later (Tr. 82, 92, 101).

Moreover, Agent Gore's familiarity with the standard interior configuration of "Fiberform" boats stemmed partially from his prior study of "Fiberform" sales brochures (Tr. 82-84), and not solely from his inspection of the decoy boat. The agents' discovery of the marijuana on the load boat, therefore, was not sufficiently dependent upon or related to the allegedly unlawful search of the decoy boat to constitute an "exploitation of that illegality" (*Wong Sun* v. *United States*, 371 U.S. 471, 488).[4]

[4] Petitioners contend that the court of appeals impermissibly contradicted "findings of fact" made by the trial judge at the suppression hearing. Specifically, petitioners claim that the court of appeals erred by mischaracterizing the investigative goal of Agent Gore's decoy boat search and by finding probable cause to justify that search. The contention is insubstantial. The court's description of Agent Gore's investigation of the decoy boat as a "search for registration papers and his concurrent observation of the configuration of the interior of the boat" (Pet. App. 7) does not differ materially from the trial judge's treatment of the search as "an inquiry to determine whether or not the boat that they had a right to search [the load boat] looked like the other boat that was supposed to be identical, with the same hull number" (Tr. 277). In any event, whether the primary purpose of the decoy boat search was to view its interior configuration as Agent Davis testified (Tr. 27), to clear up the mystery generated by the identical license numbers as Agent Gore testified (Tr. 82), or to achieve a combination of those aims as the court of appeals apparently concluded, is simply irrelevant to the issue of the legality of the search. In view of the highly suspicious facts then known to the agents, either agent's characterization of the goals of the search would be consistent with an investigation undertaken with the requisite probable cause.

Furthermore, the trial court did not decide that there was no probable cause for the search. Rather, assuming the illegality of the decoy boat search *arguendo*, it chose to respond directly to the "fruit of the poisonous tree" argument put forward by petitioners (Tr. 277):

> I can't find that [the search of the decoy boat], while that act might have been an intrusion into the boat, that that was or would taint the discovery, as the search [of the load boat] had already been in progress.

Thus, the court of appeals did not "reweigh the credibility of the witnesses and reach a different factual conclusion as to the state of the evidence" (Pet. 13) in finding probable cause to support the decoy boat search.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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